United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-6106

United States Court of Appeals
For the Second Circuit

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P/S

SECURITIES AND EXCHANGE COMMISSION,

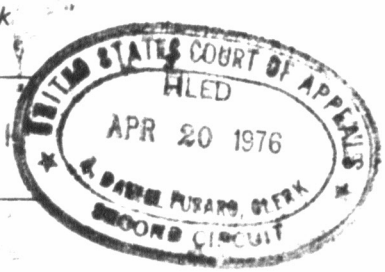
Plaintiff-Appellee,

-against-

SAMUEL H. SLOAN, Individually
and d/b/a SAMUEL H. SLOAN & CO.,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York



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PRELIMINARY STATEMENT

This is an appeal by Samuel H. Sloan ("Sloan") from various orders entered by the Hon. Robert J. Ward of the United States District Court for the Southern District of New York. Among the orders from which this appeal is taken is an order of contempt entered by Judge Ward on September 3, 1975. The appellee, the Securities and Exchange Commission ("S.E.C."), has filed a seven page answering brief which does not address the merits of this appeal. Instead, the S.E.C. contends (1) that the orders appealed from are not appealable orders and (2) that the questions raised on this appeal are moot. For the reasons set forth more fully below, the first of these arguments is without merit and the second has no legal basis.

ARGUMENT

POINT I

THE CONTEMPT ORDER APPEALED FROM IS APPEALABLE.

The S.E.C. devotes exactly one sentence of its brief to its argument that an order of civil contempt can never be appealed. In spite of the assurance with which the S.E.C. appears to be speaking, it is apparent that the S.E.C. must realize that it is on shaky legal ground. The appellant's brief cites many cases where the Supreme Court and the courts of appeals have entertained appeals from civil contempt orders. None of those appeals were dismissed because of non-appealability. In fact, the Appeal of the United States Securities & Exchange Commission 226 F. 2d 501 (6th Cir. 1955) was an appeal from an order of civil contempt. There, the Hon. William H. Timbers, then the General Counsel for the S.E.C., was adjudged to be in civil contempt of court and was remanded to the custody of the U.S. Marshal because of his disobedience of a court order requiring him to turn over various files and records of the S.E.C. The S.E.C. appealed and Judge Timbers was released from custody. Had an order of civil contempt not been appealable, as the S.E.C. here says, it is possible that Judge Timbers would still be in jail.

It should be noted that the claim by the S.E.C. that an order of civil contempt is not appealable is made here for the first time by the S.E.C. As the S.E.C. states in its brief, Sloan moved for a stay pending appeal. In opposing this motion, the S.E.C. cited a number of decided cases involving civil contempt. One such case was United States v Handler 476 F. 2d. 709 (2d Cir. 1973). That appeal was not dis-

missed for non-appealability. Thus it is clear that the S.E.C. well knows that civil contempt orders can under some circumstances be appealed. Clearly, its argument to the contrary is presented in bad faith.

This does not mean that all civil contempt orders are appealable. The S.E.C.'s brief does cite three instances where civil contempt orders were held not to be appealable. However, it is clear from a reading of these decisions that those cases involved civil contempt orders readily distinguishable from the order involved here. Indeed, from reading these decisions the bad faith displayed by the S.E.C. in presenting this argument becomes evident.

The rule which the courts must apply in deciding whether an order is appealable was established by the Supreme Court in Cohen v Beneficial Industrial Loan Corporation 337 U.S. 541, 545-546 (1949). There the court stated:

> "At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 U.S.C. §1291, 28 U.S. C.A. §1291, provides, as did its predecessors, for appeal only "from all final decisions of the district courts," except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgements, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.
>
> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intevention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one

review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. (citations omitted)."

From this it follows that the order in question is appealable. Clearly, the intent of the order is to put Sloan in jail. This will necessarily have "a final and irreparable effect on the rights" of Sloan and hence is appealable. In contrast, the $150,000 per day fine imposed on the defendant in United States v International Business Machines Corp. 493 F. 2d 112 (2d. Cir. 1973) and the $47,259.08 fine imposed in Rosenfeldt v Comprehensive Accounting Service Corporation 514 F. 2d 607 (7th Cir. 1975) were held not to be appealable, since a fine, unlike confinement, does not cause irreparable harm since the money would be recoverable if the party upon whom the fine is imposed were to prevail when a final judgment is entered and, if that party does not prevail, the propriety of the fine can be reviewed along with the final judgment on appeal. Indeed, the court in Rosenfeldt made it clear that it considered the fine not to be appealable specifically because the judge who imposed the fine also vacated the jail sentence. 514 F. 2d at 607.

In the case at the bar, Sloan has actually spent two days in jail because of the capricious actions of Judge Ward and remains in continuous danger of being further confined arbitrarily. It is clear that Sloan has suffered irreparable harm and that the order of contempt could not have been reviewed along with the final judgment because in fact the district court had no intention of entering a final judgment until after Sloan had "purged" himself of the supposed contempt. This circumstance becomes apparent from the fact that the S.E.C. moved for and order staying discovery until Sloan "purged himself" of his contempt and the fact that this motion was granted by Judge Ward in December, 1975.

Although this case has been pending now since December 30, 1974, or for nearly sixteen months, the S.E.C. has yet to put this case on the trial calendar or to take any action whatever to move things along. It should be remembered that in the last lawsuit the S.E.C. brought against Sloan, the decision of which was reported as S.E.C. v Sloan 369 F. Supp. 996 (S.D.N.Y. 1974), the complaint was filed on June 17, 1971 but the S.E.C. did not bring the case to trial until December 11, 1973, or two and one half years later, and then only because Judge Ward put pressure on the S.E.C. to clear this case off his docket. In that case, there was no discovery or other pretrial proceedings and clearly there was no reason for the long delay. In the instant case, there is no reason why the case cannot be brought to trial tomorrow and yet the S.E.C. has indicated no willingness to do so. These are not isolated instances of untoward delay on the part of the S.E.C. In S.E.C. v Power Resources Corp. 495 F. 2d 297 (10th Cir. 1974) the Court of Appeals noted that it was faced with a three year delay on the part of the S.E.C. in bringing its case to trial and affirmed the action of

the district court judge in dismissing the complaint of the S.E.C. for failure to prosecute.

If the S.E.C. were permitted to prevail on its frivolous claim that an order of civil contempt can never be appealed, it would be given the power to imprison Sloan and presumably other litigants for many years while twiddling its thumbs and waiting for the district court to force it to go forward with its case, while meanwhile remaining insulated from appellate review. Clearly, this is the position the S.E.C. would like to be in and clearly this cannot be permitted by the court.

It should be noted that the complaint of the S.E.C. demanded inter alia a mandatory injunction requiring Sloan to permit immediate examination of Sloan's records by officers of the S.E.C. Thus, once the S.E.C. has examined Sloan's records, Sloan has been irreparably deprived of his claimed Fourth and Fifth Amendment constitutional rights and the S.E.C. has in effect prevailed on the merits. With this in mind, several of the considerations delineated by the Supreme Court in Cohen v Beneficial Industrial Loan, Corp., supra come into play. For one, the orders appealed from here are not "fully consummated decisions [which] are but steps towards final judgment in which they will merge." See 337 U.S. at 546. Rather, what has happened here is that Judge Ward has decided the merits of this case even though he has not formally entered a final judgment. However, it should be remembered that the document frequently referred to as a preliminary injunction entered on January 17, 1975 actually took the form of a final and permanent injunction and was entered as a judgment by the clerk of the district court.

Other considerations involved in Cohen, supra are relevant as well. This appeal involves questions which are "too important" to be denied review. 337 U.S. at 546. Indeed, if an appeal could not be had here as a matter of right, the orders in question would clearly be appealable under 28 U.S.C. §1291(b) as an appeal from an interlocutory order which will materially advance the ultimate termination of the litigation cf. Slade v Shearson, Hammill & Co., Inc. 517 F. 2d. 398, 400 (2d Cir. 1974). In fact, it can be said with relative certainty that if this court decides this appeal on the merits, the decision will for practical purposes end the litigation regardless of who wins. Consequently, policy considerations and the interests of judicial economy require that this appeal be decided. Incidently, it can be observed that the S.E.C. is wrong when it asserts in page 6 footnote 5 of its brief that Sloan has never sought special leave to appeal. In fact, Sloan moved for leave to appeal under 28 U.S.C. 1292(b). See Appendix p. 120.

One authority cited by the S.E.C. which has not been previously discussed here is Fox v Capital Company 299 U.S. 105 (1936). That decision appears to involve proceedings of the type brought under New York law which were recently declared to be unconstitutional by a three judge federal district court in Vail v Quinlan ___ F. Supp. ____ 44 U.S.-L.W. 2332 (S.D.N.Y. January 7, 1976). The Fox decision is somewhat archaic and has not been relied upon by the Supreme Court for many years so that one is entitled to question whether it is still good law. In any event, it is readily distinguishable from the case at the bar for a variety of reasons. For one, Fox v Capital Company involved supplementary proceedings after a judgment was entered. The judgment debtor was attempting to thwart the efforts of the judgment creditor to levy on his assets by refusing to reveal where his assets were.

Clearly, there is and can be no constitutional right to conceal one's assets and to harass one's judgment creditors, or at least none was asserted by the petitioner in that case. Indeed, the only question raised by the petitioner there was that $10,000 of the fine imposed was inflicted as retribution for a crime. Although it is true that the petitioner could have been imprisoned had he refused to pay the fine, there is nothing in the decision to indicate that this actually occurred. In fact, the decision of the court below, Capitol Co. v Fox 85 F. 2d 97, 99 (2d Cir. 1936) makes it clear that all the court did was to dismiss an appeal from an order denying a motion to quash a "witness subpoena." That decision is, of course, still good law. Thus, the language of the Supreme Court decision upon which the S.E.C. is presumably basing its argument is dicta and, for obvious reasons, does not control here in any event. Indeed, in Sibbach v Wilson & Co. 312 U. S. 1 (1941) the Supreme Court entertained an appeal by the plaintiff from an order imprisoning her for civil contempt.

Under the law which does control in this Circuit, an order of the type involved here is appealable and, on appeal, the underlying order upon which the contempt is based may be reviewed. United States v Baird 241 F. 2d 170, 172-173 (2d Cir. 1957) citing United States v United Mine Workers 330 U.S. 258, 294-295 (1947) and other authorities. Thus this court can and should review the propriety not only of the contempt adjudication but of the underlying order, namely the order of injunction entered on January 17, 1975 even though an appeal from that order was previously dismissed by this Court. S.E.C. v Sloan No. 75-7056 (2d Cir. January 7, 1976).

It should be noted that United States v Baird, supra also dealt with the same New York procedure with which Fox v Capital Co., supra was concerned and arose from a case which came from the same district

court, namely, the Southern District of New York. Thus it is clear that this Circuit has never construed Fox v Capital Co. as holding that orders of civil contempt can never be appealed. Again Fox v Capital Co. involved a "witness subpoena." The S.E.C. has not served a subpoena or an administrative summons of any kind upon Sloan nor, for that matter, did it personally serve the order of civil contempt. These points, of course, go to the merits of Sloan's appeal. As to Sloan's right to appeal, there can be no doubt.

However, even if there were doubt, it should be noted that the S.E.C.'s argument is premised on the claim that what is involved here is civil contempt. It is clear from the record of this proceeding that from the beginning the desire of the S.E.C. and Judge Ward has been to punish Sloan and that there is nothing which Sloan could have done, other than what he did do, to prevent himself from being punished. The transcript of the proceedings of February 2, 1976 establishes that when Sloan appeared in Judge Ward's court on that day, he was immediately remanded to the custody of the U.S. Marshal even though the S.E.C. had not yet taken the trouble to appear in court. (Transcript p. 6). Later, Judge Ward directed the U.S. Marshal to take Sloan to the Court of Appeals so that he could argue a pending appeal there. (Transcript p. 43). Thus a presumably unusual circumstance arose where Sloan argued orally his appeal in Sloan v Canadian Javelin Ltd. No. 75-7096 (2d Cir. decided Feb. 6, 1976) while he was under arrest. Subsequently, when Sloan was returned to Judge Ward's courtroom, he argued vigorously, as he had previously, that his records had long been available to the S.E.C. and that the S.E.C. had declined to examine them. The court then called Ralph Pernick, the S.E.C. attorney assigned to handle Sloan's case (Transcript p. 50), to testify (Transcript p. 45).

On cross, Sloan repeatedly asked Pernick what efforts the S.E.C. had taken to examine Sloan's records (Transcript pp. 56, 57, 58). On each occasion, either the S.E.C. or Judge Ward interrupted Sloan's questioning. The only answers which Sloan was able to get were as follows: (Transcript p. 58).

> Q. "I am starting with April of 1975 to February of 1976, has the Securities and Exchange Commission made any effort to examine these records.....?
>
> A. Just prior to that time a motion was made to hold the defendant in contempt for not complying with the order of injunction. That motion was pending until September -- excuse me, until sometime I believe, late July. No efforts were taken at that time, in that -- during that period of time that I am aware of to schedule such an examination."

Again on page 59-60 Pernick testified:

> By Mr. Sloan:
>
> "Other than the single telephone call that you made in September, have you made any other attempts to contact Mr. Sloan?
>
> A. Subsequent to the automobile accident?
>
> Q. Starting in April of '75 to February of '76.
>
> A. Personally no.
>
> Q. Are you aware -- has the Securities and Exchange Commission to your knowledge ever gone to Virginia during this period and made an effort or attempted to examine these records?
>
> A. I have no knowledge of that, either that the Commission sent representatives there or that they did not send representatives there."

It is clear that Pernick, who was the S.E.C. attorney in charge of the investigation of Sloan, was deliberately evading the question. However, what this and the rest of the testimony taken on February 2, 1976 clearly establishes is that the real interest of the S.E.C. in this matter is not in actually examining Sloan's records but in winning its case in court and in vindicating its legal authority. Indeed, the

very purpose of this proceeding can be none other than to make Sloan an example for anyone who dares to question the legal authority of the S.E.C.

However, the immediate question before this court is whether Sloan has the right to appeal and it is submitted that there can be no doubt as to what the answer is. Not only is an order of civil contempt appealable under the circumstances of this case but the entire record of this proceeding establishes that the true intent and purpose of this so-called civil contempt proceeding is to punish Sloan and therefore what is involved here is criminal rather than civil contempt. On February 2, 1976 Judge Ward repeatedly made it clear that Sloan was going to go to jail regardless of what he did on that date. As Sloan appropriately stated (Transcript pp. 80-81):

> "I don't see any reason why I should be punished and held in prison for even an hour or a week in order to get the Commission to do something which they have not attempted to do...."

Nevertheless, Judge Ward put Sloan in jail. It is, of course, Hornbook law that an order of criminal contempt is appealable. In any event, it is clear that Sloan has the right to appeal from the order in question regardless of whether the order is considered to deal with civil or criminal contempt.

POINT II

THIS APPEAL IS NOT MOOT.

This appeal is not moot. See United States v Schrimsher 493 F. 2d 842, 843-844 (5th Cir. 1974) However, the slip shod manner with which the S.E.C. briefs its argument concerning mootness warrants com-

ment.

It ironic that the appellant here has argued that the entire lawsuit is moot (Appellants brief p. 61) whereas the S.E.C. asserts that this appeal is moot while stating in almost the same breath in footnote 7 of its brief that it intends to proceed in the district court on its application for a permanent injunction. It should be apparent from this statement that this appeal is not moot and, for that matter, that the lawsuit is not moot either.

One of the premises upon which the S.E.C.'s claim of mootness is based is that Sloan "agreed ..... to purge the order of civil contempt." In fact, however, Sloan agreed to nothing of the kind. Instead, Sloan pointed out, as he did in the brief filed in this appeal, Appellants Brief p. 54, that if the S.E.C. wished to examine Sloan's records it should proceed to Lynchburg, Virginia and that the only reason the S.E.C. had not examined Sloan's records to date was that it was "too lazy" to do so.

An examination of the record of the proceedings on February 2, 1976, which have now been filed as part of the record of this appeal, reveals that nothing of material significance occurred on that date other than the fact that Sloan appeared in court and Judge Ward "ordered" the S.E.C. to proceed to Virginia, something which he had not previously ordered the S.E.C. to do. Thus, although Judge Ward had "ordered" Sloan to permit immediate examination by the S.E.C. of his records, Judge Ward never, prior to February 2, 1976, ordered the S.E.C. to look at these records and there is no evidence that the S.E.C. made any effort whatever to examine Sloan's records at any

time from April, 1975 to February 2, 1976.

Moreover, it is clear from the record of this case that Judge Ward will do whatever the S.E.C. asks him to do and consequently, if this appeal is dismissed on the grounds of "mootness," the S.E.C. will have the power to turn the civil contempt faucet on and off at will. The preliminary injunction of which the S.E.C. claims Sloan was in contempt is in effect to this day. There is nothing to stop the S.E.C., tomorrow or the day after this appeal is decided, from going into Judge Ward's court, claiming that again Sloan is "not particularly inclined to cooperate with the Commission" and having Sloan summarily thrown in jail. This procedure was adopted by the S.E.C. in the past and there is every reason to believe that the S.E.C. will do so again in the future, especially if this appeal is dismissed. The procedure adopted by the S.E.C. is, incidently, unconstitutional under Vail v Quinlan, supra.

In support of its claim that this appeal is moot, the S.E.C. cites three cases. None of these cases involve contempt and only one of them is concerned with mootness. That case is Socialist Labor Party v Gilligan 406 U.S. 583, 589 (1973). There, a three judge district court declared a Ohio statute unconstitutional and, while an appeal was pending to the Supreme Court, the Ohio Legislature revised the law which, both sides agreed, mooted all but one of the constitutional issues. Clearly, that decision is totally irrelevant here. The other two decisions cited by the S.E.C. are even more far afield, if that is possible. In Thorpe v Housing Authority of Durham 393 U.S. 268, 283-284 (1969) the petitioner claimed that she was being unconstitutionally evicted from her apartment by not being advised of

the reasons for her eviction, a claim with which the Supreme Court agreed. However, the petitioner additionally requested that the Supreme Court "establish guidelines to insure that she is provided not only the reasons for her eviction but also a hearing that comports with the requirements of due process." This the Supreme Court refused to do stating that it would not "decide abstract hypothetical or contingent questions." Again, this decision is clearly irrelevant.

The third decision cited by the S.E.C. is equally without bearing considering the facts of this case. There, in Alabama State Federation of Labor v Macadorey 325 U.S. 450, 460 (1945) the court was unable to find that the statute, which the Union officials who had brought the suit claimed to be unconstitutional, had adversely affected these union officials in any way and stated that the court would not "decide abstract, hypothetical or contingent questions." Once again, that decision has no bearing on the case at the bar.

The fact that these three cases are so completely irrelevant indicates that the S.E.C. has displayed not a small amount of gall even in filing its brief. Incidently, it should be pointed out that the attorney who apparently wrote this brief, Thomas C. Taylor, III, stopped working for the S.E.C. on February 13, 1976, only a few days after this brief was filed. This presumably accounts at least in part for the slap dash and slip shod nature of this brief.

In any event, the appellant has researched the question of whether the contempt order might be moot and, after consulting the Modern Federal Practice Digest and other authorities and after reviewing a number of Supreme Court and other court decisions dealing with the

question of mootness, has concluded that the appeal in question is not moot.

To begin with, the S.E.C.'s claim that this case involves "abstract, hypothetical or contingent questions which should not be decided" is without merit. This case involves a running controversy between Sloan and the S.E.C. which was first presented to the court when the S.E.C. filed its first complaint on June 17, 1971. This controversy has now been before the courts for nearly five years, and is likely to continue to be before the courts for another five years unless this court does what the S.E.C. does not want it to do which is to decide this appeal. There is nothing "abstract, hypothetical or contingent" about the questions involved here. It is not disputed, nor could it be, that Sloan has already spent two days in jail and will remain in constant danger of being a guest of the federal government in the future particularly if this court refuses to decide this appeal. Indeed, Sloan has standing to bring a suit for declaratory relief declaring his imprisonment to have been unlawful under the standards set by the Supreme Court in Steffel v Thompson 415 U.S. 452 (1974). In fact, under that decision Sloan would have standing to seek declaratory relief even had he not been imprisoned. Clearly, then, the dismissal of this appeal might put Sloan in the position of being forced to institute a new suit to vindicate a claimed legal right. Since policy considerations if none other should prohibit this result, it is clear that this appeal is not moot.

Moreover, Sloan to this day continues to be adversely affected by the orders appealed from. On January 7, 1976 this Court dismissed three Sloan appeals: S.E.C. v Sloan & Co. No. 74-1436; S.E.C. v Canadian

Javelin Ltd. No. 75-7046; and S.E.C. v Sloan No. 75-7056. Although the court gave no specific reason for dismissing these appeals it appears that the appeals were dismissed because Sloan was adjudged to be in contempt of court in the instant case. At the hearing on February 2, 1976, Judge Ward three times expressed the view that Sloan's appeals had been dismissed and were going to continue to be dismissed until Sloan "purged" himself of contempt. (Transcript pp. 7, 12 and 20). To this day, the Court of Appeals has refused to reinstate these appeals although Sloan has moved for this relief. Presently, Sloan has a petition for rehearing and suggestion that the rehearing be in banc pending on all three appeals and if this attempt is unsuccessful the S.E.C. can expect that Sloan will file in the United States Supreme Court three petitions for a writ of certiorari and possibly a motion for leave to file a peitition for a writ of mandamus. Unless and until this court or the Supreme Court reinstates these three Sloan appeals, Sloan will continue to be aggrieved by the order of contempt appealed from here and hence this appeal clearly is not moot.

The concept of mootness was discussed by the Supreme Court in De Funis v Odegaard 416 U.S. 312, 316-319 (1974) and in Sosna v Iowa 419 U.S. 393, 398-403 (1975). Under the explanation found in these two decisions, the case at the bar could not possibly be moot for any of a number of reasons. To begin with, even accepting the S.E.C.'s version of this case, what is involved here is the type of order "capable of repetition, yet evading review" held not to be moot in Southern Pacific Terminal Co. v ICC 219 U.S. 498, 515 (1911). As pointed out previously, there is no reason to believe that the S.E.C. cannot and will not put Sloan in jail tomorrow, for example. Yet, if this case is moot, such an action would, for practical purposes, never

be reviewable since the period of Sloan's imprisonment would presumably be so short that he would be released before the usual appellate process is complete. cf. Roe v Wade 410 U.S. 113, 125 (1973). Thus Sloan could be imprisoned over and over again and on each occasion the S.E.C. would be able to argue that appellate review could not be had because of "mootness." Clearly, the S.E.C. cannot be permitted to succeed on this point.

It is interesting to note that in many injunction actions brought by the S.E.C., the defendants are heard to assert that the action is moot because the allegedly illegal conduct has ceased. In those cases the S.E.C. invariably cites United States v W. T. Grant Co. 345 U.S. 629, 632 (1953) which held that "voluntary cessation of the alleged illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." In the case at the bar, Sloan is alleging that the order adjudging him to be in contempt was illegal and clearly the fact that Sloan is not in jail at the present moment does not make this controversy moot particularly since Sloan still has the order of preliminary injunction hanging over his head.

It should be remembered that the mootness concept is not based upon general policy considerations but rather upon "Article III of the Constitution under which the exercise of judicial power depends upon the existance of a case or controversy." De Funis v Odegaard, supra 416 U.S. at 316. Thus, a court may dismiss a case as moot only upon a finding that it has no jurisdiction to decide the case. Article III jurisdiction to decide this appeal is clearly not a problem here,

particularly since this lawsuit is still pending in the district court.

If there exists any problem in deciding whether or not to decide this appeal, that problem is resolved by the Declaratory Judgment Act 28 U.S.C. §2201 which states that "any court of the United States... may declare the rights and legal relations of any party seeking such declaration, whether or not further relief is or could be sought " Clearly, Sloan, by filing a notice of appeal, declared his intention to seek a declaration that the order adjudging him to be in contempt of court was illegal and he has every legal right to have this question decided by this court.

It seems to be understood that any order adjudging an attorney to be in contempt of court is never moot. The rationale for this is the threatened harm to a professional reputation which results whenever an attorney is held to be in contempt of court. For example, when an attorney applies for admission to practice in the Southern District of New York he must state whether or not he has ever been held in contempt of court. Apparently, an adjudication of contempt can form the basis for a denial of admission to practice in the Southern District of New York. Similarly, the Texas procedure which formed the basis for the Supreme Court decision in Maness v Meyers 419 U.S. 449, 456 n. 6 (1975) contained a provision which established special procedures in the case where an attorney is held in contempt of court. That decision, incidently, again demonstrates Sloan's right to appeal in the instant case as well as the correctness of Sloan's other claims.

It would be an egregious wrong if Sloan were denied the right to appeal under circumstances where an attorney in the same position would

be allowed to appeal. Sloan may someday become an attorney although his efforts up to this point to do so have been unsuccessful. See Sloan v Court of Appeals of New York ___ U.S. ___, 96 S. Ct. 405, 46 L. Ed. 2d. 310 (1975). In any event, as noted previously this court may dismiss an appeal as moot only under those relatively rare circumstances where the Constitution deprives the court of jurisdiction to entertain an appeal. One fairly recently reported case in this Circuit indicated that even a very small interest in the outcome of an appeal, such as the fact that the prevailing party would be entitled to court costs, would be sufficient to deprive a case of its moot character.

Under the principle set forth in United States v Schrimsher, supra, the appeal in question here clearly is not moot. There can be no doubt that Sloan could not have secured review of this case prior to going to jail and prior to his release particularly since Sloan exhausted every remedy available in this regard. Any deficiencies in Sloan's notice of appeal, if there are any, must be resolved in Sloan's favor in accordance with Foman v Davis 371 U.S. 178 (1962). Finally, it is clear that "collateral legal consequences" have arisen and will continue to arise because Sloan was held in contempt of court. As noted previously, the adjudication that Sloan was in contempt of court had the apparent result of causing this court to dismiss three Sloan appeals on January 7, 1976. Then on March 4, 1976, this court rendered an opinion which again made a pointed reference to the fact that Sloan had been held in contempt of court and went so far as to state that Sloan was a "fugitive from justice." Sloan v S.E.C. slip op. 2377 at 2379 (2d Cir. March 4, 1976). Thus it is clear that Sloan has lost three and possibly four appeals because of his alleged contempt. There are still other judicial and administrative proceedings where the fact

that Sloan has been held in contempt of court will no doubt be used against him, even if Sloan does not prevail on this appeal. On April 28, 1975 the S.E.C. revoked Sloan's broker dealer registration, Samuel H. Sloan, Securities Exchange Act Release No. 11376. In its decision, the S.E.C. made numerous references to the judicial proceedings involving Sloan and at one place pointedly stated that the S.E.C.'s efforts to preliminarily enjoin Sloan in the instant case had met with Sloan's "vehement opposition." (Appendix p. 116 n. 27). An appeal from that decision is still pending in this court as Sloan v S.E.C. docket no. 75-4087 and there can be no doubt that the S.E.C. on appeal will argue that Sloan's supposed contempt here provides a further basis to keep Sloan from being a broker or dealer. On the other hand, if Sloan wins here his position with respect to the contempt order and, by inference, with respect to the preliminary injunction which proceeded it, will have been vindicated, and since the S.E.C. cited the preliminary injunction as a principal basis for revoking Sloan's broker dealer registration (Appendix p. 110), it is evident that a favorable decision here might be enough to enable Sloan to prevail on that appeal. In addition, when the S.E.C. gets around to applying for a permanent injunction in this case in the court below, it will no doubt argue that the fact that Sloan has been held in contempt of court demonstrates the need for a permanent injunction. Thus, there can be no doubt that this appeal is not moot.

POINT III

THE REMAINING CONTENTIONS ADVANCED BY THE SECURITIES & EXCHANGE COMMISSION ARE WITHOUT MERIT.

By now it should be apparent that the S.E.C. would have stated its position better by not even filing a brief and, as a matter of fact, the S.E.C. filed its answering brief in this appeal without leave approximately one week after the time to file its brief as fixed by this court had expired. In any event, the S.E.C. says a few things in its brief which have not been discussed already and these statements should not go unanswered.

In footnote 5 of its brief, the S.E.C. says "It is clear that no appeals lies from the district judge's denial of the other motions set forth in Mr. Sloan's notice of appeal." The S.E.C. then cites two cases. These citations are typical of this brief as a whole in that they are entirely irrelevant. In Parr v United States 351 U.S. 513, 518 (1956) the Supreme Court held that there was no right to appeal from an order granting a motion by the United States to dismiss an indictment. In United States v Garber 413 F. 2d 284 (2d Cir. 1969) this court held that there was no right to appeal from an order of a district court denying a motion by the defendant to dismiss an indictment. These decisions both involve criminal cases wholly unlike the civil litigation here.

If there is any doubt as to the inappropriateness of these citations it should be pointed out that the Supreme Court in Maness v Meyers, supra 419 U.S. at 466 n. 15 stated:

> "Comments in a criminal case as to the law in a civil case hardly reach the level of constitutional doctrine, if indeed they are any more than dicta."

Because the S.E.C. has seen fit to cite such entirely inappropriate

cases, the appellant, and presumably the court, is put to the task of researching the question further to see if there might be any merit to the S.E.C.'s claim that the orders in question cannot be appealed. The result of this research is as follows.

The order denying Sloan's motion for disqualification of counsel is appealable under Cermaco v Lee Pharmaceuticals 510 F. 2d 268, 271 (2d Cir. 1975); a fact which was pointed out in the Appellants Brief p. 64. Indeed, one decision which the appellant is asking this court to overrule, S.E.C. v Robert Collier & Co. 76 F. 2d 939 (2d Cir. 1935) was where the S.E.C. successfully appealed from a decision of a district court granting a motion to disqualify the S.E.C. as counsel.

The order denying Sloan's motion to enjoin the S.E.C. from harassment and annoyance is appealable under Cohen v Beneficial Industrial Loan Corporation, supra.

The question of whether Sloan is entitled to a trial by jury is reviewable by way of mandamus, Beacon Theatres v Westover 359 U.S. 500 (1959) and since the jurisdiction of a court to issue a writ of mandamus is properly invoked only when necessary and appropriate in aid of its appellate jurisdiction, Chandler v Judicial Council 398 U.S. 74, 86 (1970) it follows that this question is properly reviewable here. See International Products Corp. v Koons 325 F. 2d 403 (2d Cir. 1963).

An order denying a motion to dismiss a complaint for lack of subject

matter and personal jurisdiction is appealable under the circumstances present here.*

Interlocutory discovery orders are sometimes appealable in connection with the appeal of another interlocutory order where that other appeal is had as a matter of right. See 9 Moore's Federal Practice para. 110.25 (1)

From this it can be seen that only the discovery order is of questionable appealability. The rule on this point seems to be that there must be a connection between the discovery order and the other interlocutory order from which the appeal is taken. It is submitted that in the instant case, since Judge Ward "stayed" discovery until Sloan "purged" himself of contempt, a sufficient connection can be established between the discovery and the contempt to permit immediate appellate review. It should be noted that on February 2, 1976 (Tran-

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* It is clear that the district courts improperly exercised jurisdiction over this case and this fact led to much of what happened. Among other things, Sloan timely moved to have this case transferred to the Western District of Virginia, Lynchburg Division (Appendix p. 127) where both Sloan and his records were located. The court should have granted this motion since Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa) specifies that "Any suit or action .... to enjoin.... may be brought in any such district or in the district where the defendant is found or is an inhabitant or transacts business." Ironically, Sloan was using the personal law library of the district judge in Lynchburg to write his briefs during the very period when the S.E.C. and Judge Ward were claiming that he was in contempt of court. Clearly, this could not have happened had Judge Ward not improperly denied Sloan's motion to transfer this case. Of course, the district court lacked jurisdiction for other reasons, as the Appellant's Brief has pointed out.

script p. 68) Judge Ward stated:

> "You complain that there has been no discovery, yet you have declined to produce your books and records.....
>
> So, I think it is hardly appropriate to argue to this Court that this case should have proceeded along with discovery and trial when we had appeals pending by you....."

For this reason, the appellant believes that the discovery orders involved here are appealable.* In any event, the S.E.C. has not adequately briefed this question and it is not for the appellant or for the court to argue the S.E.C.'s position, if the S.E.C. has a position, in this appeal. Consequently, Judge Ward's decisions and orders should be reversed entirely.

CONCLUSION

For all of the reasons set forth above, all of the decisions and orders of the district court should be reversed.

DATED: April 11, 1976

Respectfully submitted,

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* Furthermore, even if the discovery orders are not themselves appealable, they may nevertheless reviewed for, as Vol. 9 of Moore's Federal Practice para. 110.25(1)p.273 states:

"Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it.

SEC V. SLOAN

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the XX19 day of April 197 6 deponent served the within Reply Brief upon:

Securities and Exchange Commission

attorney(s) for
Appellee

in this action, at

500 N. Capitol St.
Washington, D.C. 20549

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 19
day of April, 197 6.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977